MALAYSIAN REPORTS

LOO PANG v. NG CHYE

[R.C.J. (Sharma J.) July 9, 1973]
[Ipoh — Civil Revision No. 4 of 1973]

Practice and Procedure — Adjournment — Costs — Functions of Bench and Bar.

On the day fixed for hearing of this action the plaintiff applied for adjournment of the hearing on the ground that a material witness was unavailable. By reason of a private arrangement between counsel for the parties, the defendant was informed by his counsel that his attendance at the court was unnecessary and he was absent on that day. The magistrate granted an adjournment and awarded costs against the defendant.

Held: the discretion (of awarding costs against the defendant) exercised by (the magistrate) was not a judicial discretion but sprang from spite.

CIVIL REVISION.

Loh Poh Seng for the plaintiff.

Lal Harcharan Singh for the defendant.

Sharma J.: The plaintiff filed a suit in the Magistrate's Court at Ipoh claiming possession of certain land of which she claimed to be the owner and which according to her statement of claim was in the occupation of the defendant merely as a licensee. The defendant claimed to be the plaintiff's tenant and not a licensee. The action was fixed for hearing on 7 June 1973. It had, however, so transpired that the plaintiff's counsel had a few days earlier notified the defendant's counsel that the plaintiff would be applying for an adjournment on 7 June 1973. The defendant's counsel thereupon quite justifiably took it that the plaintiff's counsel would on the date of hearing apply to the court for an adjournment. It was on that assumption that he informed his client (the defendant) that it was not necessary for her to be present in court on the day of hearing.

I must say that this private arrangement or understanding between the two counsel was, to say the least, too presumptuous, uncalled for and not free from risks.

The subordinate courts are already hard pressed with work and if for some valid reason the plaintiff's counsel thought it proper to ask for an adjournment an application to that effect should have been made not on the morning of the hearing but some time prior thereto so that the magistrate could fix some other matter for disposal on that day. As things however turned out the plaintiff's counsel appeared in court on 7 June 1973 with his client and made an oral application for an adjournment on the ground, I am told, that one of his essential witnesses could not be served. That, in my view, was not a sufficient ground for not going on with at least a part of the hearing of the case. The learned magistrate turned down the application in the morning and expressed his desire to go on with the case in the afternoon. The plaintiff was present in court and the plaintiff's counsel, in those circumstances, expressed his readiness to proceed with the hearing in spite of the fact that he had some days earlier told the defendant's counsel that he was not going to proceed with any evidence on behalf of the plaintiff and that he would in fact be applying for an adjournment of the case itself. It was, it seems, at that stage that the defendant's counsel rose to inform the magistrate of the absence of his client and the reasons for that absence. The defendant's counsel had advised his client that it would not be necessary for her to attend. It was impossible for the counsel then to get in touch with his client. The plaintiff's counsel had not told the defendant's counsel that the defendant need not attend but it must be said to the credit of the plaintiff's counsel that he informed the magistrate that he was mainly to be blamed for the absence of the defendant and that it would be unfair to the defendant if the case was to go on in her absence. It was made abundantly clear to the learned magistrate by the defendant's counsel that in advising his client not to attend court he had meant no disrespect to the court. The learned magistrate, however, took the view that the defendant's counsel had usurped the functions of the court and some uncalled for offensive, and totally unwarranted remarks, far below the dignity of the court, were passed by the learned magistrate. I must say it was the learned magistrate who had lost the judicial calm, restraint, that imperturbality and tranquility of mind which should always characterise the working of every court.

The plaintiff's counsel was urging upon the learned magistrate that it was he and he alone who was in fact responsible for the absence of the defendant and that but for the insistence of the learned magistrate to go on with the case he would rather have it adjourned as he had already given a solemn assurance to the other side to that effect. The learned magistrate thereupon stood down the case and adjourned it to 2.30 p.m. for hearing. The counsel for both the parties and the plaintiff duly appeared before the learned magistrate at 2.30 p.m. and it was again the plaintiff's counsel who prayed to the learned magistrate that in the circumstances it was in the interests of justice that the case should be adjourned. The learned magistrate's view, however, was that the defendant should have been present in court at that time. Whether the defendant was personally present in court or not was irrelevant in the circumstances at that juncture. There was no order made by the learned magistrate at any prior stage that he required the defendant to be present in court at 2.30 p.m. Even if that order was made in the morning of 7 June 1973 it would have been an order which could not stand. The physical presence of the defendant was impossible to be obtained within those few hours. If the learned magistrate felt that in spite of the physical absence of the defendant (although his counsel was representing him in court at that time) he should go on with the case he should have heard the evidence of the plaintiff. The fact, however, was that one of the essential witnesses for the plaintiff whose testimony was vital to the plaintiff's case was not there and the plaintiff recognised and acknowledged that she could not succeed without that witness. It was the plaintiff's counsel who had made an application for adjournment. The learned magistrate in the circumstances did ultimately grant an adjournment but the order that he made was that the costs of the day were to be paid by the defendant. The defendant did not at any time ask for an adjournment. It was for the plaintiff to prove her case.

It is apparent to me that the order made by the learned magistrate awarding costs of adjournment against the defendant was made purely on account of a hostile attitude which he had taken to the defendant's counsel in what he thought was the usurpation of the court's authority and power by the counsel concerned. The discretion exercised by him was not a judicial discretion but sprang out of spite. In the circumstances the order of the learned magistrate awarding costs to the plaintiff for an adjournment which he had himself asked is set aside and an order substituted therefor that the plaintiff do pay the costs of that adjournment.

I need only add that a reasonable and workable amount of harmony and goodwill, if not a complete accord and adjustment, ought to prevail between the Bench and the Bar and the mere fact that a presiding officer of the court whether he be a judge or a magistrate sits a few feet higher than the floor from which the counsel addresses him should make no difference in the attitude, duties and status of the two. Both of them are part of the same machinery of justice. Both of them are essentially men of law and presumably of honour, no doubt performing different functions but those functions are aimed at one and the same end and that is the administration of justice with dignity, courtesy and honour and these qualities should be seen and reflected in their respective conduct and behaviour. The Bench and the Bar both serve the public and the law which the public is expected to respect and honour. Those connected with the administration of law and justice should be so worthy as to command that respect and honour.

Order accordingly.

Solicitors: *Lim Cho Hock & Co.; L. H. Singh & Co.*

CHE SU BINTI SHAFIE v. SUPERINTENDENT OF PRISONS, PULAU JEREJAK, PENANG

[O.C.J. (Chang Min Tat J.) August 30, 1973]
[Penang — Originating Motion No. 13 of 1973]

Habeas Corpus — Detention Order — Allegation that grounds of detention not served on detenu — New order made — Allegation of mala fides — Emergency (Public Order and Prevention of Crime) Ordinance, 1969, ss. 4(1) and 5(2)(b).

This was an application for an order of *habeas corpus* in respect of a detainee. The question was whether the detenu was detained on a valid order under the law. It was urged that there was failure to comply with the provisions of section 5(2)(b) of the Emergency (Public Order and Prevention of Crime), 1969, requiring that the detenu be furnished by the Minister with the grounds of his detention and that the Minister was acting *mala fide* in signing a new order.

Held: (1) the failure, if any, to observe in full the provisions of section 5(2)(b) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969, could not invalidate the order made by the Minister under section 4(1) of the Ordinance;

(2) on the facts of the case, no question of *mala fides* could arise, as it was always open to the authorities to cure a defective order in the proceedings.

Cases referred to:-

(1) *Greene* v. *Secretary of State for Home Affairs* [1942] A.C. 284.

(2) *Musa bin Salleh* v. *Public Prosecutor* [1973] 1 M.L.J. 167.

(3) *Naranjan Singh* v. *State of Punjab* A.I.R. 1952 S.C. 106.

ORIGINATING MOTION.

Karpal Singh for the applicant.

Abu Talib bin Othman (Legal Adviser, Penang) for the respondent.

Chang Min Tat J. (delivering oral judgment): In approaching this application for *habeas corpus* I remind myself of what Viscount Maugham in *Greene* v. *Secretary of State for Home Affairs*(1) said in his speech at page 290:

"My Lords, I am certain that this House would be very unwilling to curtail or diminish the rights of an applicant for a writ of *habeas corpus ad subjiciendum*, but we are, of course, sitting in a judicial capacity and are bound by the law as it exists. It is inaccurate to say, as some have said, that the writ is applicable as a remedy in all cases of wrongful deprivation of personal liberty. What the judges of the High Court can do at the instance of the imprisoned person is to command the production of the person and to inquire into the cause of his imprisonment. If there is no legal justification for the detention, the party is ordered to be released."

I would therefore assure Mr. Karpal Singh for the applicant that I also share the sentiments of Suffian F.J. in *Musa bin Salleh* v. *Public Prosecutor*(2) at page 169, that the court should lean in favour of the subject concerned and also of Rigby J. (as he then was) that the subject could always rely on technical defects to invalidate the order which deprived them of their liberties.

But the question before me is whether the detenu is presently detained on a valid order under the law. Whatever might have been the position with regard to the order made under section 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance No. 5 of 1969 bearing the date or purporting to bear the date 6 August 1973, that position has now been changed since that order has been revoked as the Minister of Home Affairs is perfectly entitled to do. He has now made a new order, signed under his hand, dated 21 August 1973 which has been served on the detenu. In view of this development, Mr. Karpal Singh for the applicant now based his fight for the liberty of the detenu upon an attack on this new order.

His first ground was directed not to the order but to the purported failure to comply with the provisions of section 5(2)(b) requiring that the detenu be furnished by the Minister with the grounds of his detention. It was said that this failure rendered the order invalid, as being of a mandatory nature.

On the other hand, it was contended by the Legal Adviser that the grounds under section 5(2)(b) which were signed by an official of the department by the direction of the Minister were in compliance with the requirements of this section. It was suggested that the requirements were not mandatory and that in any event there were under the Delegation of Powers Ordinance in section 6 provisions for the delegation of an administrative act.

The view I take of the case is this: It is my duty to examine whether the detenu is detained under a valid order. The order of 21 August 1973 is a valid order and no attack has been or can be mounted against this particular order. Whether section 5(2)(b)